STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2003
v	No. 233564 Genesee Circuit Court
JACK DUANE HALL, Defendant-Appellant.	LC No. 00-007132-FC

Before: Cooper, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of kidnapping. MCL 750.349. He was sentenced to serve life in prison. He now appeals and we affirm.

Defendant's conviction arises out of the 1993 rape, robbery and kidnapping of the victim as she was leaving work. Defendant accosted her in the parking lot as she was walking to her car and forced her at gun and knife point to a nearby wooded area. Defendant handcuffed her to a tree and sexually assaulted her. Defendant fled the scene, taking with him the complainant's underwear, driver's license, social security card, wedding rings, and computer (which the victim had been carrying out to her car at the time of the attack).

The crime remained unsolved until 1999 when a witness, Larry Shetron, who had been jogging in the area at the time of the attack, saw defendant's photograph and contacted the police, indicating that he thought defendant was the person he had seen in the area of the attack. This tip prompted the police to compare DNA from a blood sample obtained from defendant under a search warrant to semen samples from the victim's vagina and clothing. Defendant's DNA matched five genetic locations from the semen stains, with the odds of someone other than defendant being the source of the semen being one in thirty billion for the Caucasian population.

Meanwhile, defendant was a suspect in an unrelated case. A search warrant for a storage unit was executed in that case, during which the computer stolen in the case at bar was discovered, further linking defendant to the attack in this case. A search was also conducted in defendant's apartment, which yielded clothing similar to that involved in the attack, but which the victim could not positively identify. A gun was also found, which, like the clothing, the victim said "could very well be" the gun used in the attack, but could not positively identify it as the weapon used.

Defendant has filed both a brief through appellate counsel and in pro per, raising several claims of ineffective assistance of counsel. The standard of review for ineffective assistance of counsel was set forth by the Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. to demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Turning first to the claims raised in the brief filed by counsel, defendant argues that trial counsel was ineffective by failing to move to suppress the gun and ski mask discovered in the search of defendant's residence.[1] The search was conducted on July 30, 1999, under a search warrant issued in an unrelated case, the July 2, 1999, murder of Anne Paetz. The warrant authorized the seizure of, among other things, "any weapons, including and not limited to a knife or other sharp object" and "any other physical evidence, including trace evidence, such as blood, hair saliva [sic], and fibers . . .." The warrant does not specifically mention either a gun or clothing.

On appeal, defendant argues that trial counsel should have moved to suppress the gun and the ski mask on the ground that the warrant was unduly broad. Specifically, the affidavit in support of the warrant did not indicate the involvement of a gun in the murder of Paetz or of any particular article of clothing involved. In fact, the affidavit avers that the victim's neck had been cut and that the autopsy determined the cause of death to be "loss of blood due to slice wounds to the neck area." There is no mention of the involvement of a firearm. Furthermore, the affidavit makes no mention of any particular piece of clothing to be searched for that would link defendant to the crime.

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[1] Additionally, defendant argues that testimony from the person who sold him the gun in 1992 should have also been suppressed.

On the other hand, the prosecutor offers no argument for the admissibility of the gun and ski mask beyond a conclusory assertion that "the trial court would have been correct in denying the motion" and a reference to the argument discussed below which raises a claim of plain view. Although defendant does make a strong argument that the gun and the ski mask were either outside the scope of the warrant or that the warrant violated the specificity requirement of the Fourth Amendment, defendant does not meet his burden of showing that, but for trial counsel's error, a different result was probable. We are not persuaded that, even if the gun and ski mask had been suppressed, there was a reasonable likelihood of a different result in this case.

First, the value of the gun and ski mask as evidence was minimal at best. As defendant observes in his brief, the victim only testified that the gun and ski mask "could very well be" the ones used by her assailant. Second, there was very significant evidence against defendant. The jogger provided a strong identification of defendant as the individual seen in the area of the attack and the DNA evidence provided a thirty billion to one probability of defendant being the attacker. Given the strength of this evidence, and the minimal value of the challenged evidence, we are not persuaded that a different result would have occurred had the challenged evidence been suppressed.

Defendant also argues that trial counsel was ineffective for failing to move to suppress evidence regarding the victim's computer found in defendant's storage unit under a separate search warrant. During the execution of the above warrant, the police observed an unpaid invoice in defendant's name for rent on a storage unit. A second warrant was obtained and executed that day, listing the same items to be seized as the earlier warrant, this time for the storage unit. During the execution of that warrant, a computer was observed in the storage unit. Because a computer was not listed in the items to be seized, the police did not seize the items, but did photograph the computer and in particular the serial numbers on the computer and mouse. It was later established that these matched the serial numbers of the computer stolen from the victim during the 1993 attack.

The analysis of this issue is somewhat more problematic. On the one hand, it is fairly clear that, if the police had to move the computer in order to be able to see the serial number, that constituted an illegal search under *Arizona v Hicks*, 480 US 321; 107 S Ct 1149; 94 L Ed 2d 347 (1987), and a motion to suppress would have been successful. On the other hand, it is not clear from the record before us that the computer had to be moved in order for the police to have seen the serial number.

First, the issue whether manipulating the computer in order to see the serial number constitutes a search is easily resolved by *Hicks*. In *Hicks*, a bullet was fired from the defendant's apartment through the floor and into the apartment below. The police entered the defendant's apartment to search for the shooter, for other victims, and for weapons. While there, one of the officers observed two sets of expensive stereo components which seemed out of place. The officer had to turn two of the components in order to see and record the serial numbers. After learning that the serial number on a turntable matched one taken in an armed robbery, the officer seized the turntable. Later, when additional serial numbers matched, an warrant was obtained and additional stereo equipment was seized.

The Supreme Court, in an opinion by Justice Scalia, initially noted that the recording of the serial numbers did not constitute a "seizure" under the Fourth Amendment:

> We agree that the mere recording of the serial numbers did not constitute a seizure. To be sure, that was the first step in a process by which respondent was eventually deprived of the stereo equipment. In and of itself, however, it did not "meaningfully interfere" with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure. [*Id.* at 324.]

However, the Court went on to conclude that the manipulation of the stereo equipment in order to see the serial numbers constituted a search:

> Officer Nelson's moving of the equipment, however, did constitute a "search" separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment. Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest. See *Illinois v Andreas*, 463 US 765, 771 (1983). But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry. This is why, contrary to JUSTICE POWELL's suggestion, *post*, at 333, the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable. [*Hicks*, *supra* at 324-325.]

Applying *Hicks* to the case at bar, there would be no basis for suppression of the computer's serial number from evidence if the serial number was exposed to view. That is, if the officers were able to see the serial numbers while lawfully executing the search warrant, it would not be improper to view and record, or even photograph, the serial numbers provided they could do so without moving the computer, or anything else, in order to expose the serial numbers. On the other hand, if the officers had to move any object not subject to seizure under the search warrant in order to expose the serial numbers to sight, then an improper search occurred. It is not clear from the record before us whether the serial numbers were visible without improperly moving the computer or any other object.

At trial, the officer testified that he took photographs of the computer and mouse and specifically the serial numbers. However, the officer did not testify whether it was necessary to move the computer and mouse in order to see the serial numbers. Indeed, the only evidence of movement of the equipment to which defendant points is the photographs themselves, which clearly depict someone holding the mouse and the computer in different positions, indicating that it had been moved. However, the fact that the computer had been moved does not establish that it was necessary to move the computer in order to expose the serial numbers. That is, under *Hicks* we would not equate the mere movement of the equipment to facilitate the recording by photograph of that which was already visible to the officers as a search. Such conduct would not meaningfully interfere with either defendant's possessory interest in the property or his privacy interests. In other words, we see no distinction of constitutional importance between the

officer's photographing the serial number or merely writing down a serial number that is exposed.

Ultimately, defendant bears the burden of establishing the factual basis for his claim of ineffective assistance of counsel. *Carbin, supra* at 600. Defendant has failed to do this. Based upon the record before us, defendant has failed to establish that the serial numbers were not visible absent the moving of the equipment. Therefore, defendant has not established a necessary fact to show that a motion to suppress would have been successful and, therefore, counsel's failure to make such a motion prejudiced the defense. Accordingly, defendant's claim of ineffective assistance of counsel must fail.[2]

Having rejected the claims raised by appellate counsel, we now turn to those raised in defendant's pro per brief. First, defendant argues that he was denied the effective assistance of counsel when counsel failed to object to the state's dividing the kidnapping charge from the criminal sexual conduct and felony-firearm charges, thus violating the Double Jeopardy Clause of the Fifth Amendment. This argument is frivolous. The criminal sexual conduct and felony-firearm charges were dismissed at the preliminary examination, on defendant's motion, due to the running of the period of limitations. Therefore, the present case represents the only prosecution that arose out of this criminal transaction. Simply put, defendant has been placed in jeopardy only once, not twice.

Next, defendant argues that counsel was ineffective by allowing the prosecutor to prove the criminal sexual conduct and felony-firearm offenses, which were dismissed, in order to prove the kidnapping. Defendant argues that because the presentation of evidence that criminal sexual conduct and felony-firearm did, in fact, occur, his right to the statute of limitation defense, as well as the protection against double jeopardy, was violated. However, because defendant was not tried on those charges, he was not deprived of any defense to those untried charges nor placed in jeopardy on those charges.

Defendant next argues that he was denied effective assistance of counsel because of counsel's failures to suppress the witness' in-court identification, to object to the dividing of the charges, to object to inadmissible evidence and prosecutor misconduct, and to object to the violation of his rights to the statute of limitations defense. This argument merely restates defendant's positions raised in the other issues and presents no new or additional arguments.

Defendant's next claim of ineffective assistance of counsel is that counsel failed to move to suppress Larry Shetron's in-court identification of defendant. Shetron saw defendant's photograph in a newspaper in 1999. He then contacted the police and told them that defendant looked like the person he saw on the day of the 1993 attack against the victim. Defendant's argument is without merit for a number of reasons. First, defendant challenges the in-court

[2] Additionally, as with the last issue, defendant would have difficulty in light of the DNA evidence in showing that a different result was likely had a suppression motion been successful. On the other hand, the computer evidence is much more compelling to show defendant's guilt than the gun and ski mask. That is, while the gun and ski mask may have been involved in the attack on the victim in this case, defendant's possession of the computer stolen from the victim during the attack provides a very direct link by defendant to the crime.

identification of him at the preliminary examination. Evidentiary errors committed at a preliminary examination do not require reversal absent a showing that the error prejudiced the defendant at trial. *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990). Second, defendant fails to show how Shetron's identification of defendant was in any way tainted. The newspaper photograph Shetron saw of defendant did not identify defendant as a suspect in this case. Rather, it is Shetron's observation of the photograph which led him to contact the police and to defendant's becoming a suspect in this case. Accordingly, defendant has made no showing that a different result would have occurred had counsel made such a motion.

Defendant next argues that he was denied effective assistance of counsel due to counsel's failure to object to the prosecutor's referring to evidence that was never presented to the jury. Specifically, defendant refers to the prosecutor's mentioning in opening statement that the police search of defendant's residence disclosed a long-sleeved camouflaged shirt. Defendant complains that the prosecutor did not thereafter introduce the shirt into evidence and that the prosecutor thereafter improperly referred to the shirt in closing argument. Although the camouflaged clothing was not introduced as an exhibit, the officer conducting the search did state that he found camouflaged clothing in the search. It was also disclosed that the victim indicated that she did not believe it was the same article of clothing worn by her attacker. The prosecutor's references to the clothing in closing argument was that defendant liked to wear the type of clothing worn by the attacker. We see no basis for counsel's having objected at trial to the prosecutor's comments. Camouflage clothing was found during the search and that fact was established by testimony. We are aware of no requirement that it be introduced as an exhibit. Furthermore, even assuming that the prosecutor should not have made the comments and defense counsel should have objected, defendant has made no showing that a different result would have resulted absent those statements.

Defendant's final argument is that the cumulative effect of the errors necessitate reversal. Having found no errors in the issues raised by defendant, there is no cumulative effect which necessitates reversal.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ William B. Murphy